82-1383

No. .

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

WILLIAM J. CINTOLO,
PETITIONER,

v.

UNITED STATES OF AMERICA AND
THE HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

DAVID BERMAN,
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Questions Presented

1. Is an order disqualifying an attorney from representing witnesses before a Grand Jury appealable under Title 28 U.S.C. §1291, or §1292(a), or under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)?

2. If an order disqualifying an attorney from representing witnesses before a Grand Jury is not appealable, is it nevertheless subject to challenge in a petition for extraordinary relief under Title 28 U.S.C. §1651 generally or, especially where as here, the District Court acted on a premature motion that had already been denied by another Judge of the same Court and failed to hold even the semblance of a hearing before allowing the motion?

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO.

WILLIAM J. CINTOLO,
Petitioner,

V.

UNITED STATES OF AMERICA
HONORABLE ANDREW A. CAFFREY,
CHIEF JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS
Respondents,

Citations to Opinions Below

There are no reported opinions below. The brief *per curiam* opinions of the Court of Appeals dismissing Petitioner's appeal and denying his petition under Title 28 U.S.C. §1651 are duplicated as appendices to this petition.

Jurisdiction

On January 26, 1983, the United States Court of Appeals entered judgments dismissing Petitioner's appeal from an order

of the United States District Court for the District of Massachusetts (Caffrey, C.J.) entered on January 19, 1983 disqualifying Petitioner, an attorney, from representing witnesses before a grand jury in a particular investigation on the ground that such an order is not appealable and denying Petitioner relief in a petition under Rule 8(a) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. §1651 filed on January 24, 1983. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

Questions Presented

1. Is an order disqualifying an attorney from representing witnesses before a Grand Jury appealable under Title 28 U.S.C. §1291, or §1292(a), or under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan*

Corp., 337 U.S. 541, 546 (1949)?

2. If an order disqualifying an attorney from representing witnesses before a Grand Jury is not appealable, is it nevertheless subject to challenge in a petition for extraordinary relief under Title 28 U.S.C. §1651 generally or, especially where as here, the District Court acted on a premature motion that had already been denied by another Judge of the same Court and failed to hold even the semblance of a hearing before allowing the motion?

Statutory Provisions

Title 28 U.S.C. §1291 states:

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands,

except where a direct review may be had in the Supreme Court.

Title 28 U.S.C. §1292(a)(1) states:

(a) The court of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Island, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

Title 28 U.S.C. §1651(a) states:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 17.1(a) of the Rules of this Court state:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The Fifth Amendment of the Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8(d) of the Rules of the United States District Court for the District of Massachusetts states:

> (d) *Assignment.* The Clerk shall assign cases to the judges of the court by lot in such manner that each judge shall be assigned as nearly as possible the same number of cases in each category.

Rule 9(a) of the Rules of the United States District Court for the District of Massachusetts states:

> 9(a) *Matters and proceedings heard by emergency judge.* There will be designated an emergency judge to hear and determine:
>
> (1) matters requiring immediate action in cases already assigned to any judge of the court, if the judge to whom a case has been assigned is unavailable or otherwise unable to hear the matter.
>
> (2) special proceedings the nature of which precludes their assignment in the ordinary course;
>
> (3) any other proceeding, including an admission to the bar

and a naturalization, which is not part of or related to a case that should be assigned in the ordinary course.

Statement of the Case

The United States District Court for the District of Massachusetts, Caffrey, C.J., received two motions from the Government on January 18, 1983. One was a motion to make an in camera submission to the Court pertaining to Petitioner William J. Cintolo. This motion was allowed by Judge Caffrey when it was received and without any notice at all to Petitioner. The second motion was to disqualify Petitioner, an attorney duly admitted to practice before the United States District Court for the District of Massachusetts, from representing witnesses before a Grand Jury carrying on a particular investigation, especially witnesses named Orlandella

and Daw. Having informed Petitioner through his Clerk that he would hold a hearing at 4:00 p.m., on January 19, 1983 on the motion to disqualify (the Clerk reached Petitioner by telephone late in the afternoon on the 18th), Judge Caffrey began the hearing by announcing that he had read the Government's *in camera* submission and on the basis of it was allowing the motion to disqualify. At this point he had not heard any opposition to the motion and, predictably, when he heard opposition based on (*inter alia*) the fact that another Judge of the District Court had denied an identical motion by the Government[1/], the prematurity of the Government's motion since no witness whom Petitioner

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1/ This allegation is set forth in an affidavit filed by Petitioner in the District Court.

had proposed to represent had yet testified before the Grand Jury, the inappropriateness of *ex parte* communications to a Judge, especially prior to notice and in the absence of an emergency, and the failure to assign this case in accordance with the Local Rules[2/], he adhered to his decision.

The following day, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the First Circuit and a motion for stay pending appeal. The latter was denied. On January 24, 1983, the appeal having been entered in the Court of Appeals, Petitioner also filed in that Court a petition for writ of mandamus,

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2/ The Local Rules require the assignment of all cases, with certain exceptions of which motions to disqualify are *not* an example, by lot, but the Government's motion was assigned to Judge Caffrey as Emergency Judge.

and writ of prohibition and other relief under Title 28 U.S.C. §1651. Without hearing, the Court of Appeals on January 26, 1983, with only the briefest of opinions, dismissed the appeal and denied relief under §1651.

Because of the *ex parte* nature of virtually all of the Government's submissions to the District Court, there is no factual record to which Petitioner can refer. It may be inferred, however, (a) that the Government believes Petitioner to be a target of an investigation currently undertaken by a Grand Jury, (b) that Orlandella and Daw, the witnesses who are specifically mentioned in the Government's motion and whom Petitioner indeed intended to represent in their appearance before the Grand Jury, were being called to testify

in connection with this investigation, and (c) that the Government regards Petitioner's representation of Orlandella and Daw and any other Grand Jury witness called in connection with this investigation as a conflict of interest.

Reasons for Granting the Writ

I. WITH RESPECT TO WHETHER DECISIONS DISQUALIFYING ATTORNEYS ARE APPEALABLE, THERE IS A CONFLICT AMONG THE CIRCUITS, AND THE FIRST CIRCUIT'S RULE OF "NON-APPEALABILITY" IS NOT IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND IS WRONG.

Rule 17.1(a) of the Rules of this Court indicates that a conflict of the decision rendered by a court of appeals with decisions rendered by other Courts of Appeals is an important consideration governing the exercise of the certiorari jurisdiction. There is in plain and simple

English a conflict among the circuits on whether orders disqualifying attorneys from representing witnesses are appealable. Cases holding that they are immediately appealable include *Matter of Grand Jury Empaneled January 21, 1975*, 537 F.2d 1009, 1011 (3rd Cir. 1976); *In Re Investigation Before April, 1975 Grand Jury*, 531 F.2d 600, 605, fn. 8 (D.C. Cir. 1976); *United States v. Curcio*, 694 F.2d 14, 19-20 (2nd Cir. 1982); *In Re Lynchburg Grand Jury*, 563 F.2d 562, 655 (4th Cir. 1977); *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 528 (5th Cir.). The First and Ninth Circuits take the opposite view. *In Re Benjamin*, 582 F.2d 121, 123, 125 (1st Cir. 1978). *United States v. Greger*, 657 F.2d 1109, 1111-1115 (9th Cir. 1981). Regardless of which view is right, the time has plainly come for this Court to take upon

itself the duty of umpiring the Federal system and settling the rule on appealability of orders disqualifying attorneys one way or the other.

This, of course, would be true even if the view taken by the First Circuit were right. But it is not right. Plaintiff has a right of appeal under either of two statutes, or, if not, under the collateral order doctrine enunciated in such cases as *Perlman v. United States*, 247 U.S. 7, 13 (1918) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

We consider first whether the order was appealable as a "final decision" under Title 28 U.S.C. §1291. Although the entry and service in the case are somewhat informal, to say the least, this is basically a civil action, unreleated to any indictment to any pending case, in which

the Government sought and obtained specific relief on the bases of specific representations. Even if Orlandella and Daw never testify before any Grand Jury, even if no indictments are ever returned, even if the Government should at some time in the future give up its investigation entirely, an order has been made in an adversary proceeding. Whatever other orders may or may not be final decisions within the purview of §1291, an order terminating an action is plainly final. See *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 170-171 (1974).

It may be argued, however, that a decision disqualifying an attorney is not "final" in that circuits like the First that do not permit direct appeal nevertheless permit review on the merits if a witness under subpoena is held in contempt for refusing to answer questions

and the refusal is based upon the invalidity of the order of disqualification. See *e.g., In Re Benjamin*, 562 F.2d. 121, 123 (1st Cir. 1978). It remains to be seen, however, whether the order of disqualification is an interlocutory order granting an injunction and thus appealable under the provisions of Title 28 U.S.C. §1292(a)(1). Once again we must note that Petitioner has been directed by the Court not to do that which he would otherwise have both a right and a duty to do, represent before the Grand Jury witnesses who have retained him for that purpose. To quote Black's Law Dictionary (De Luxe Fourth Ed.), page 923:

> INJUNCTION. A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some

> act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff and not such as can be adequately redressed by an action at law. Dupre v. Anderson, 45 La.Ann. 1134, 13 So. 743; City of Alma v. Loehr, 42 Kan. 368, 22 P.424. A judicial process operating in personam and requiring person to whom it is directed to do or refrain from doing a particular thing. Gainsburg v. Dodge, 193 Ark. 473, 101 S.W. 2d 178, 180.

If because of its potential for later review in a contempt proceeding, the order issued by Judge Caffrey was not "final," it was nevertheless an "injunction" within the purview of this language and, being interlocutory in character, immediately subject to review by the Court of Appeals.

Finally, even if the order of disqualification was neither an interlocutory injunction nor a final decision, Petitioner

submits that it came within the so-called collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). As this Court stated in *Eisen v. Carlisle & Jacquelin*, *supra*, 171-172:

> We find the instant case controlled by our decision in Cohen v. Beneficial Indus. Loan Corp., *supra*. There the Court considered the applicability in a federal diversity action of a forum state statute making the plaintiff in a stockholder's deprivative action liable for litigation expenses, if ultimately unsuccessful, and entitling the coproration to demand security in advance for their payment. The trial court ruled the statute inapplicable, and the corporation sought immediate appellate review over the stockholder's objection that the order appealed from was not final. This Court held the order appealable on two grounds. First, the District Court's finding was not "tentative, informal or incomplete." 337 U.S., at 546, 69 S.Ct., at 1225, but settled conclusively the corporation's claim that it was entitled by state law to

require the shareholder to post security for costs. Second, the decision did not constitute merely a "step toward final disposition of the merits of the case . . . ." *Ibid.* Rather, it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. The Court summarized its conclusion in this way:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

A motion to disqualify counsel in a criminal case implicates at least three interests: the interest of an attorney in pursuing his profession and in his reputation, see e.g., *Willner v. Committee on Character and Fitness*, 373 U.S. 96, the interest of the client in being represented

by counsel of his own choosing, *In Re Taylor*, 567 F.2d 1183, 1186, fn. 1 (1977 2nd Cir.), and the interest of the Government in avoiding conflicts of interest that may lead to motions to suppress or post-convictions proceedings. When the Government succeeds at the District Court level in having counsel disqualified, its interests are presumably fully vindicated. If the District Court acts erroneously[3/], however, how may the lawyer and the client[4/] vindicate their

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3/ The entirely *ex parte* nature of the District Court's action in the present case significantly increases the chances of error. *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968).

4/ In the present case the clients, Daw and Orlandella, received neither formal nor informal notice of the Government's motions, though they were persons entitled to notice, see *In Re Taylor*, *supra*, and their failure to receive it was specifically called to the District Court's attention.

respective interests if the order is non-appealable? The client, we are told, may do so by refusing to answer questions before the Grand Jury and, if he is cited from contempt, challenge the citation on the grounds that the order disqualifying his attorney was improperly made.

From virtually every viewpoint, this procedure smacks of foolishness. In the first place, it calls upon one District Court Judge to review a finding and ruling made by another District Court Judge or, perchance, by himself. Such review is likely to prove embarrassing or meaningless or both. From the client's viewpoint, there is the need to hire (and pay) counsel who will represent him in a new proceeding and to assume the risk of obloquy and imprisonment. To make matters worse, the client is forced to assume all

these risks merely to assert one of his basic Constitutional rights: the right to be represented by counsel of his own choosing. *Taylor, supra.*

From the lawyer's viewpoint, the procedure of review by contempt citation is even worse. In all likelihood the client in most cases will not take the risks involved but will simply get other counsel, making review forever impossible. Even if the client remains steadfast in his choice of counsel, in the face of virtually every known principle with respect to the law of standing, see *Laird v. Tatum*, 408 U.S. 1, 14, fn. 7 (1972), the lawyer will be looking to a third party to vindicate his rights. Since he is effectively without any but the most illusory means of vindicating his rights if the order of disqualification is unappealable, and since disqualification generally includes not

merely immediate harm to the lawyer's pocketbook but, much worse, long-range harm to the lawyer's reputation, the disqualification of the lawyer must be appealable. *Perlman v. United States*, *supra*. At the very least, the order with respect to the lawyer is so far final as to be appealable under the rule of *Eisen*, *supra*.

II. THE COURT OF APPEALS ERRONEOUSLY RULED THAT PETITIONER WAS NOT ENTITLED TO RELIEF UNDER TITLE 28 U.S.C. §1651.

In its brief order denying relief under Title 28 U.S.C. §1651 the Court of Appeals gave three reasons why Petitioners were not entitled to relief. These were (a) the absence of "patent abuse of discretion" (b) the absence of new or important issues regarding the power of the District Court, and (c) the absence of extraordinary circumstances.

To the extent that the decision rested

upon the absence of important issues of law, it is in conflict with the holding of the Second Circuit in *In Re Taylor*, *supra*, 1187, that the motion to disqualify counsel from representing witnesses before the grand jury was premature, and should have been dismissed. In *Taylor*, *supra*, 1185-1186, the Court was faced with facts indistinguishable from the facts in the present case except that in *Taylor* there was no allegation that the attorney was a target of the Grand Jury. But that distinction is without substance since it is as much a conflict for an attorney to represent witnesses with conflicting interests as it is for him to represent witnesses whose interests may conflict with his own.

Yet another important issue raised by the §1651 petition was whether Respondent Caffrey should have in effect overruled a decision made several weeks earlier

by another Judge of the United States District Court for the District of Massachusetts. Both on grounds of *res judicata*, see *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916), and on the grounds that one Judge should not normally "overrule" a decision of another Judge in the same Court and in the same case, see *Donnelly Garment Co., v. National Labor Relations Board*, 123 F.2d 215, 220 (8th Cir. 1941), Judge Caffrey should have allowed Petitioner's motion to dismiss the Government's motion for disqualification.

A third important issue of law was whether this case should have been assigned by lot as Rule 8(d) of the Rules of the United States District Court for the District of Massachusetts seems to require and not merely assigned to Respondent Caffrey as emergency judge. We note that

motions of this type are not included under cases assignable to the emergency judge under Rule 9 of the Rules of the United States District Court.

But by far the most extraordinary aspect of this case is the manner in which it was handled by Respondent Caffrey in the District Court. Upon receiving a motion from the Government for leave to make an *in camera, i.e., ex parte,* submission, he allowed the motion even before Petitioner had even received notification that the motion had been filed. There are, of course, occasions on which an *ex parte* submission to a judge is appropriate; the classic example is an application for a temporary restraining order. See Rule 65(b) of the Federal Rules of Civil Procedure. But the power to issue restraining orders is hedged above by numerous safeguards including a

ten-day expiration date, Rule 65(b), and a judge issuing it knows that the Defendant will promptly receive a copy of all submissions made to him and have a full opportunity to rebut, explain and contradict whatever was said in the application. Even so, temporary restraining orders are disfavored in the Federal courts, and only a most substantial showing of urgency will justify the granting of such an order. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70*, 451 U.S. 423, 438-439 (1974) ("The stringent restrictions imposed by §17 and now by Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted

both sides of a dispute").

In the instant case the Government made no showing in its motion for leave to make an *ex parte* submission of any emergency justifying such a submission. It did in the motion indicate that Petitioner was a target of an on-going grand jury investigation. But even if, as the motion did *not* say, the submission that the Government proposed to make was of evidence that had been or would be presented to the grand jury,[5/] that allegation, taken as true, would not require that the submission be *ex parte* either under Rule 6(e) of the Federal Rules of Civil Procedure or under common law. See, *e.g.*, *Silverior v. Municipal Court of Boston*, 355 Mass. 623, 627-628, 247 N.E.2d 379, (1969) cert. den. 396 U.S. 878.

Having allowed the Government's motion for leave to make an *ex parte* submission,

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5/ The motion for leave to file affidavit for *in camera* review stated that the affidavit contained the "substance of evidence ... presently before the grand jury."

Respondent Caffrey then allowed the Government's motion for disqualification. It was as simple as that. Since according to his lights Petitioner had no right to knowledge, or even an inkling, of what was in the submission and since what was in the submission convinced him that Petitioner should indeed be disqualified, why waste time on listening to any issues of fact or law that Petitioner might wish to raise? He opened the so-called "hearing" by announcing that he was allowing the Government's motion, and thus there was in reality no hearing at all. *Cf. Morgan v. United States*, 304 U.S. 1, 18 (1938); *Interstate Commerce Commn. v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93 (1913); *Billington v. Underwood*, 613 F.2d 91, 95, (5th Cir. 1980). Petitioner came to court to hear the verdict read and the sentence pronounced, without benefit of trial, hear-

ing, or even notice of the charges.

It should hardly be necessary to point out that notice and the opportunity for hearing lie at the heart of the Due Process Clause of the Fifth Amendment. To quote *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950):

> An elementary and fundamental requirement of due process *in any proceeding which is to be accorded finality* is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action *and afford them an opportunity to present their objections*. Milliken v. Meyer, 311 U.S. 457; Grannis v. Orleans, 234 U.S. 385, Priest v. Board of Trustees of Town of Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information. (Emphasis supplied.)

The right to be heard prior to disqualification has been applied to the right to practice law. *Willner v. Committee on*

Character & Fitness, 373 U.S. 96, 102, 103-105 (1963) as it has been applied to the right to practice other professions and occupations. See, e.g., *Connell v. Higginbotham*, 403 U.S. 207, 208-209 (1971) and cases cited.

Particularly applicable here is *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1928) stating that not merely the general right to practice a profession but the right to practice a specific aspect of it may not be cut off without the opportunity for a hearing.

The manner in which Respondent Caffrey reached his decision dovetailed rather neatly with his denial of Petitioner's motion for a continuance, a motion that Petitioner did not even have the opportunity to make until the decision was announced: e.g., if the motion was to be allowed *ex parte*,

why give Petitioner time for preparation? But Petitioner was entitled to be heard, and twenty-four (24) hours was insufficient time. See *Granny Goose Foods, Inc., v. Brotherhood of Teamsters, supra*, 432, fn. 7 (same day notice on hearing of preliminary injunction did not suffice).

If the manner in which Respondent Caffrey conducted himself on the Government's motion to disqualify Petitioner was not a "patent abuse of discretion" justifying intervention by the Court of Appeals through a writ of mandamus, under what circumstances could it be said that discretion was patently abused. In what conduct after all could a judge engage in respect of a motion by the Government to disqualify an attorney that would be more outrageous than that of Respondent Caffrey in the present instance? Perhaps the answer to the Court of Appeals

is that it is sufficient grounds for the issuance of a writ of mandamus that the District Court abused its discretion, *i.e.*, usurped its power, *Will v. United States*, 389 U.S. 90, 95 (1967), and that whether, as Petitioner believes, it did so patently, is a less than important issue.

In seeking certiorari to review the order dismissing the petition under §1651, Petitioner has emphasized the procedural aspects of what transpired in the District Court. This could be taken as a *sub silentio* admission that substantively the Government's position was correct. No such admission is intended. The problem with any attempt to discuss the "substantive" aspects of the Government's case is that Petitioner knows virtually nothing about them. For one to proclaim his innocence when he has no idea of the conduct with which he is charged is fatuous. Petitioner could hardly dispute that he is the

target of a Grand Jury investigation, nor can he agree that he is.

It "is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 403 (1976). Petitioner has not forgotten. In asking this Court to review the judgments of the Court of Appeald dismissing his appeal and denying his §1651 petition, Petitioner recognizes that reversal of the former judgment will make the latter judgment moot. If the order of disqualification is held nonappealable, Petitioner has suffered, contrary to the intimation of the Court of Appeals, a grievous wrong at the hands of both Respondents, for which he has no effective remedy, see

In Re Oswalt, 607 F.2d 645, 648 (5th Cir. 1979), and this case ought to be within that narrow band of cases in which the refusal of relief by mandamus is erroneous in law. *Cf. Beacon Theatres, Inc. v. Westover*, 359 U.S. 509, 511 (1959).

CONCLUSION

For the reasons given a writ of certiorari should issue to review the judgments dismissing Petitioner's appeal and denying his petition for extraordinary relief.

By Petitioner's Attorney

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Appendix.

United States Court of Appeals for the First Circuit

No. 83-1045.

IN RE GRAND JURY PROCEEDINGS,

WILLIAM J. CINTOLO,
APPELLANT.

BEFORE COFFIN, *Chief Judge*,
BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT

Entered January 26, 1983

In accordance with our order denying appellant's petition for writ of mandamus, stay, writ of prohibition, and injunction, the appeal is dismissed.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Berman and Ms. Collins]

United States Court of Appeals for the First Circuit

No. 83-1050. ORIG.

IN RE
WILLIAM J. CINTOLO,
PETITIONER.

BEFORE COFFIN, *Chief Judge*,
BOWNES AND BREYER, *Circuit Judges*.

ORDER OF COURT

Entered January 26, 1983

There being no right to appeal pre-indictment disqualification of an attorney, *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978), and there being no patent abuse of discretion or new and important issues regarding the power of the district court or other extraordinary circumstances warranting a writ of mandamus, see e.g. *In re Oberkoetter*, 612 F.2d 15, 17 (1st Cir. 1980), the petition for writ of mandamus, stay, writ of prohibition, and injunction is denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

(Cert. c. Hon. Andrew A. Caffrey, Clerk, U.S.D.C., Mass.;
cc: Messr. Berman and Ms. Collins.)